Nos. 45 and 59.

FILED
OCT 30 1902
JAMES H. McKENNEY,
Clerk.

5855

REPLY BRIEF OF DEFENDANTS IN ERROR.

Reply Brf. of Bryan & Mitchell for D. E.

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 30, 1902.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
against
ARTHUR LYNAH, ET AL., DEFENDANTS IN ERROR. } No. 45.

THE UNITED STATES, PLAINTIFF IN ERROR,
against
CHAS. A. WILLIAMS & AMELIA S. WILLIAMS,
DEFENDANTS IN ERROR. } No. 59.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

REPLY BRIEF OF

J. P. K. BRYAN,

Counsel for Defendants in Error in No. 45.

JULIAN MITCHELL, Jr.,

Counsel for Defendants in Error in No. 59.

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Walker, Evans & Cogswell Co., Printers
3 Broad Street
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Writ of Error to the Circuit Court of the United States for the District of South Carolina.

Reply Brief of
J. P. K. BRYAN,
Counsel for Defendants in Error in No. 45.

JULIAN MITCHELL, Jr.,
Counsel for Defendants in Error in No. 59.

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In reply to the Brief filed by the distinguished counsel for the United States, we desire to call the attention of the Court to the following points—the first of which is—

THE EXTENT OF OUR TITLE.

In the discussion of the extent of the title of the plaintiffs, counsel for the Government has overlooked altogether the pleadings and facts found by the Court below, which amount to a verdict of a jury on a question of title and location. By the pleadings, paragraph three of the complaint, petitioners allege that they are owners as tenants in common of a certain plantation, and particulary allege as follows :

"A certain tract or parcel of which said plantation, containing four hundred and twenty (420) acres, more or less, *which is delineated on a map of said plantation, and enclosed within red lines.*" (Lynah case.)

By reference to this map of the plantation, the *locus in quo* is set forth by this plat, both in reference to the other lands, and also to the Savannah Back River.

As to this allegation, the Answer, (Transcript of Record, page 5,) is a denial of information sufficient to form a belief. This, under the South Carolina Code, is a issue of the title as to the premises particularly described.

On this issue of fact the Court finds :

"III. Edward Lynah, the father of the plaintiffs, at the time of his death, and for many years previous thereto, *was the owner in fee simple* of a plantation on Savannah River, in the State of South Carolina, known as Vernezobre, containing about 2,100 acres of high land and rice land. He held this plantation under sundry successive mesne conveyances connecting his title with a grant of the said land by the Lord Proprietors of South Carolina, in 1736."

"IV. A certain parcel of this plantation, measuring about 420 acres, has been reclaimed by drainage, and had been in

"actual continued use for seventy years and upwards as a rice "plantation, used solely for this purpose."

"It appears from the plats among the muniments of plain- "tiff's title that these *rice lands were reclaimed and enclosed, and "in a state of culture, one hundred and twenty years ago, and "probably longer.*"

And in the Williams case, the petition alleged that :

"A certain tract or parcel of which said plantation, containing "four hundred and four and 53-100 acres, more or less, which "is delineated on a map of said plantation, and enclosed within "red lines, hereto annexed and made part of this complaint, has "been, for seventy-five years and upwards, a rice plantation on "Savannah Back River."

Williams Case, Transcript, page 2.

Finding of Fact Two is :

"II. The plaintiffs are * * the owners, *in fee simple,* as "tenants in common of a plantation on the Savannah River, "known as "Beach Hill," containing 1,486 acres of high and "rice land."

Williams Case, Transcript, page 8.

"A portion of this plantation is on the fresh tidal waters of "the Savannah River, the surface of which land lies between "high and low water. *This portion* (i. e. the rice lands, "the *locus in quo* here,) was granted by the Lords Proprietors of "South Carolina in 1738, and the grant thereafter confirmed by "Act of the Legislature of South Carolina. It has been for "over a century protected from the river, or any invasion of "tidal water, by an embankment, and cultivated by the plain- "tiffs since their ownership of the said plantation in 1876, up to "the time of the abandonment thereof."

Williams Case, Transcript, page 13.

The grant referred to was a grant from the English Crown, (*See Transcript No. 59, Williams Case, p. 13, referring to Finding in Lynah Case, No. 45, p. 15, fol. 30,*) and the Act confirming same is the so called Act of Peace, now to be found as Section 2361 of Code of Laws of South Carolina, 1902.

From this *finding of fact* of title and in location of grant, and extent of title, there is no assignment of error, and there could

be none. Yet the counsel for the Government attempt now to argue the question in this Court.

TENURE OF THE RICE LANDS.

The counsel for the Government states the South Carolina rule as follows (his brief, p. 19) :

"The State *had, in the beds of these tidal channels,* not only "title as property, the *jus privatum,* but something more, the *jus* "*publicum,* consisting of the rights, powers and privileges "*derived from the British Crown,* and belonging to the governing "head, which she held in a fiduciary capacity for general and "public use; in trust for the benefit of all the citizens of the "State, and in respect to which she had *trust* duties to "perform. *3 Kent, 377; Martin v. Waddell, 16 Peters, 367;* "*Commonwealth v. Roxbury, 9 Gray, 451; State v. Pacific, 22 S. C.,* "*48, 83.*"

But the counsel for the Government omits the balance of the sentence, which declares that these "beds of tidal channels" which the State holds in trust, are below *low water mark.*

The omitted words are :

"The absolute rule heretofore referred to, limiting land "owners bounded by such streams to the high water mark, "*unless altered by law, or modified by custom,* accords with the "view that the *beds of such channels below low water mark* are not [illegible] grant to

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"actual continued use for seventy years and upwards as a rice "plantation, used solely for this purpose."

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In addition to the acts of South Carolina confirming the grants of Lord Proprietors, sections 1873, 1875, Rev. Stat. S. C., quoted pp. 13, 14 of Brief in Lynah case, there is the further confirmatory act of South Carolina, known as the Act of Peace, now section 2361, Code of Laws of South Carolina (1902), confirming titles in all persons who had been for five years prior to July 4, 1776, in quiet, peaceable possession, which act would be a further confirmation of title, whether by grant of the Crown of England or by the Lord Proprietors.

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The omitted words are :

"The absolute rule heretofore referred to, limiting land "owners bounded by such streams to the high water mark, "*unless altered by law, or modified by custom,* accords with the "view that the *beds of such channels below low water mark* are not "held by the State simply as *vacant* lands, subject to grant to "settlers in the usual way through the land office."

Id., p. 84.

There is a distinction between the "*beds* of tidal channels," and the "shore."

Gould on Waters gives the precise definition:

"Every river consists of : (1) the bed; (2) the water; (3) "the banks or shores." (p. 98.)

"Shore is strictly applicable only to the space between ordinary high and low water mark in a tidal river. (p. 98.)

It thus appears from the counsel's own citation that the State is not a trustee for the public in the shore, but such is a subject of private ownership.

This now fully and conclusively appears in the decision of the Supreme Court of South Carolina in refusing the petition for a rehearing of that case, and when, on this very point, as to limit of "private ownership," they said :

"Certain grants from the State (1869) covering marsh lands "lying between high and low water mark were in evidence. "The legality of these grants was not contested; *but they had "not been located;* and it was not known to the Court whether "there were any marsh lands on South Wimbee Creek, which "these new grants did not cover. Being thus without informa- "tion on that subject, this Court could do no more than state "the general rule as to the extent of PRIVATE OWNERSHIP in "lands bounding on navigable tidal streams, and indicate "the "limit," to which the *grants, if located,* could carry the title of "defendants. That is to say, to declare the line to be an ordi- "nary high water mark, *except where the grants may cover the "marsh;* and where they do so, to declare the line of *low water "mark,* called for by them, as "the limit of defendant's right," "leaving, in either case, the *bed proper,* or bottom, *below low "water mark,* as the property of the State. The petition for a "rehearing is refused."

The State vs. Pacific Guano Co., 24 S. C., p. 598.

The Court below, in this case, found as an ultimate fact, that the land located within the red line of the plat was the land embraced in the grant. The Court below has, on all the evidence before it, *located the grant,* and a question of location is one of fact for the jury, the Court below, in this case, and its verdict is conclusive.

The "private ownership," therefore, in this case, as found by the Court below, was within the limit of private ownership, leaving the "bed proper," ~~between~~ low water mark, the property of the State. It is "these beds of tidal channels" that the State holds in trust, and not the shore.

In 22 S. C. 600, Oak Point Mines Case, approved by the Supreme Court of South Carolina and ordered printed by that Court as a full and clear historical exposition of the law of

lands between high and low water level, the learned Judge says:

"That land flowed by the tide is the subject of grant in this "State is conclusively shown by statutes in which 'all lands "granted in this State' were classified and rated for pur- "poses of taxation. The first of these was the Act of 1784 "(4 Stat. 627) to raise supplies. This classification was con- "tinued in the Supply Acts of each succeeding year until 1815, "when it was made permanent by 'An Act to fix the value of "lands in this State for Taxation,'' &c. (6 Stat., 7.) In these "Acts '*tide swamp* not generally affected by salt or freshets' and "'salt marsh,' proved to be 'incapable of immediate cultiva- "tion,'' are set down, the *first taking rank as the most valuable "land in the State.* There is no trace of any special legislation "providing for the location and grant of lands of this character, "and the necessary inference is that they were disposed of "under the general regulations prescribed by the statutes re- "lating to *vacant lands.*"

"An Act of 1714 (7 Stat., 61 and 62, sections 3 and 5) "recognizes claims of individuals, under grant or conveyance, "to sundry lots on the bay in Charleston, 'from *high to low water* "'*mark,*' and imposes penalties and forfeiture for neglect by "such claimants to build their proportion of the sea wall. An "Act of 1719 (7 Stat., 69, sec. 20,) reciting that owners of "front lots on the bay were discouraged from building their "part of the sea wall by reason of others claiming lots before "them to *low water mark,* provides a mode of adjusting disputes "and declares that upon failure of the claimant of the lower "lot to present his claim within a stated time, said lot should "be vested in the owner of the front lot, 'he paying to the "owner of the lot to the eastward from high to low water mark "his full charges that he was at for his *grant* for the same,'' &c. "And section 22 provides that 'upon the title to the front and "lower lots becoming vested in the same person, they should "not again be separated, and if the front lot should be disposed "of by sale or gift, the other should go along with it as an "appurtenance.''

"These citations from our statutes are, to my mind, conclu- "clusive of the question under consideration. They show un- "mistakably that lands below high water mark in tidal navigable "rivers have been uniformly recognized by the Legislature as "embraced within the description of vacant lands, and subject "as such to location and grant under the general regulations of "the land office.''

"My conclusion is that defendants have valid title under the "grant of 1869 to Henry M. Stuart, (from whom they de-"rived), to the soil between ordinary high water and low water "mark in said creek, embraced within the lines of said grant. "As to the title to the *bed of the creek* below *ordinary low water "mark*, I hold that it is in the State."

It appears in this review that the "tide swamp" not affected by salt, i. e., the fresh water tidal swamps, such as these rice lands are, were considered the most valuable lands in the State, and taxed as such; and indeed they were the basis of the agricultural industry, because it produced its chief staple, rice.

In the *Gibson* case *the law of the State of Pennsylvania*, as quoted by this Court, was as follows:

"The owner of lands bounded by navigable water has the "title in the soil between high and low water mark, subject to "the public right of navigation, and to the *authority of the Leg-"islature to make public improvements upon it, and to regulate his use of it." 166 U. S. p. 273.*

The case arose in Pennsylvania and the title to the defendant depended upon that law, whereas in the South Carolina case we have seen the policy of the State has been to grant the land between high and low water mark absolutely, and the trust for the public as declared by the State in its decisions was in the "beds of tidal channels" and "beds proper" of navigable streams and not in the flats or shores thereof, which were grantable of course in fee simple to all settlers, from the land office.

The State of South Carolina in addition has declared by statute that the only tenure of lands is free and common socage. Sec. 1872, Rev. Stat., 1893.

This is without any public easement whatsoever upon her grants.

It is absolute private property. It is not a revocable privilege or license.

In effect the title between high and low water is the same as that of Massachusetts, as described by the *Court in Commonwealth vs. Alger*, and affirmed by this Court in cases cited in our main briefs.

In *Commonwealth v. Alger, 7 Cush., 71,* speaking of the property as "propriety" in these flats, the Supreme Court say :

"But, however, this may be, we think it manifest, from the "whole tenor of their legislation, that when the early settlers of "Massachusetts, holding their lands under the freest and most "liberal English tenure, that of tenants *in fee simple in free and "common socage,* were making provision for granting and taking "titles to real estate for themselves and their posterity, and "when a certain valuable right and interest was annexed to and "made part of such grants of estate by the Government compe- "tent to impress such character upon it, they understood, both "those who made and those who proceeded to take titles and "settle the country under such grants, that the grantees acquired "a legal right and vested interest in the soil, and not a mere "permissive indulgence, or gratuitous license, given without "consideration, and to be revoked and annulled at the pleasure "of those who gave it."

We have seen that under the Massachusetts law, as long as the flats were unreclaimed, there was a public right of navigation, and this Court has decided that upon enclosure and tillage, the *"public right* of navigation *'ceased.'* " Same is also true as to South Carolina law upon the rule as stated by the Courts of South Carolina.

As an illustration of the law of the State of South Carolina, and her attitude as to absolute private ownership of land between high and low water mark—that is, out to the channel to the point of navigability, we refer to the following Statutes :

"VI. And be it further enacted by the authority aforesaid, "that the present proprietors of wharves and low water lots in "Charleston, shall have the exclusive privilege, for six months "after the passing of this Act, of obtaining grants for the land "covered by the water in front of their present wharves and "low water lots, as *far as the western edge of the channel* of "Cooper River, and the northern edge of the channel of Ashley "River."

Vol. V, Statutes of S. C., page 39, Act of 28th day of March, 1787.

A great part of the city of Charleston is built on these low water lots, as is Boston.

But such lots were always regarded as private property, not to be taken, except upon just compensation, as appears by the following Statute :

"VII. That no person, being the owner of any low water "lot or lots, within the corporate limits of the city of Charles- "ton, on the *edge* of Ashley or Cooper River, shall be allowed "to use the same, in any manner, that may be injurious to the "health, comfort or convenience of the citizens; and the City "Council is hereby authorized to make such regulations, and "pass such ordinances, in relation to this subject, as may be "necessary and proper; *provided, always,* that *private property* "shall not be taken for the public use by the City Council as "aforesaid, *without just compensation.*"

Vol. VII, Stat. S. C., page 151, Act of December 21, 1836.

The "private ownership" absolute and free from all easement or servitude, could not be more strongly expressed, in this recognition of the principle of "private property" in these tide lots protected by the common law principle of the Fifth Amendment, compensation for their taking.

Servitude in Issue in Pumpelly Case.

The counsel for the Government dismisses the Pumpelly case, and its binding force, as *stare decisis,* in these words :

"There was no question of a superior or other title." "* * * "There was involved no prerogative right, no trust "for the public use." (Brief, plaintiff in error, p. 27.)

Now, this is wholly incorrect. The affirmative plea of *easement* for improvement of navigation was set up in the answer, and passed upon by the Court.

By reference to the case, the Court will find, that at pages 170-171, this Court said, in stating the issues, as follows :

"It is further alleged that the dam was built under the authority "of laws of the United States, and for improvement of the navi- "gability of Fox and Wisconsin Rivers, * * * that the "Laws of Congress, and of the State, granted the *easement* right

"and privilege of overflowing the lands described to the extent "necessary to improve the navigability of said rivers. That "the United States patented the land, * * * and *plaintiffs* "*purchased, with full notice of, and subject to the easement* "and right aforesaid."

And also at page 182 this Court, in deciding the issues, said as follows :

"It is alleged that this title came to the plaintiff burdened "with an easement, in favor of improving the navigation of "the Fox River, which authorized the injuries complained of."

And this Court overruled such defence, saying, that the United States

"Retains no right to take that land, without just compensa- "tion," and "the absolute ownership and right of private prop- "erty in such land is not varied by the fact that it borders on a "navigable stream" (p. 182).

In the light of this issue, clearly made and decided by this Court in the Pumpelly case, it is futile for the counsel for the Goverment to attempt thus to dispose of this case.

PRIVATE OWNERSHIP UNDER ENGLISH LAW.

The counsel for the Government seems to question the title by usage or prescription. That there is a title by prescription or usage of such lands appears, however, from his own brief, page 15 :

"*Except* so far as an individual or corporation has acquired "rights in it by express grant, or by prescription or usage," and "cites many authorities."

Independent of any question that arises as to the grant or paper title, the facts in this case make a case of prescription and usage.

Again, at page 16, counsel admits

"There can be no doubt that in England a subject may be "the owner of a portion or tract of the shore by ancient charter "or grant."

The counsel for the Government admits in his brief, at page 22, that by the law of England the subject can be, in the language of Lord Hale, owner of the shore by prescription, or grant, or usage; but he contends, at page —, that he cannot be owner of the shore in a port or harbor.

This is not the case in the State of South Carolina; for by the Act of 1787, we have seen that low water lots at Charleston, of the Ashley and Cooper Rivers, to the edge of the channel, could be taken up by the owners, and when so taken up, interference of the State thereafter was in recognition of the right of private property, and of the doctrine of eminent domain, and just compensation being made for the taking of private property.

This doctrine of title in fee simple out to the edge of the channel—that is, to the point of navigability, is recognized in the Chicago Lake Front Cases—Illinois Central R. R. vs. Illinois, 146 U. S.—and is in accord also with the Massachusetts law of title in fee simple of flats, that when reclaimed, the public right of navigation ceases.

Now, there is no evidence or finding that this swamp was originally or ever part of a port or harbor. Moreover, it must be remembered that this rice land was, in part, as matter of fact a tidal fresh water cypress swamp, not affected by salt, (See McCrady's History) down to the present embankment on the river, it never was part of a port or harbor, and that there never was any right of fishery or navigation through this tidal fresh water cypress swamp, but only in the tidal channel of the river; that is, in its "bed proper." Indeed, as a matter of fact, the public right of navigation has never been shown to exist, or have been exercised at any time in or through these fresh water tidal cypress swamps, bordering on the Savannah River, which are a dense jungle, from the river bank upward.

It nowhere appears in this case that there ever was at any time in these cypress swamps any existing actual navigation by any person in its natural state. These rice fields are 12 miles above Savannah, are on the Back River, and do not border on the harbor.

For this Court has itself said, that "we know judicially the

fact that the harbor is the river 'in front of the city' "—speaking of Savannah.

S. C. vs. Georgia, 93 U. S., p. 13.

RULE IN CHICAGO LAKE FRONT CASES.

The counsel for the Government states as the rule, in Illinois Central R. R. Co., 146 U. S.:

"That the State could not abdicate the trust for the public in "any water ever covered by the tide, between high and low "water."

We have cited this case in our brief, but counsel omitted the exceptions as recognized by this Court, which is, the law on this case, which are in the following words :

"Portions of submerged shoals and flats" (p. 457) "parcels "which, being occupied, do not substantially impair the public "interest in the lands and waters remaining" (p. 452).

And counsel again has overlooked the fact that the law of the trust in the Sovereign, as declared in that case by this Court, and recognized ever since, was that the Illinois Central R. R. in so far as it had acquired and actually built upon the water lots of the lake, "out to the point of navigability," had a vested right, and this Court, confirming their title and absolute exclusive use and possession of the same as not inconsistent with trusts for public navigation in the State of Illinois, as sovereign trustee, enforced the trust for the public right of navigation as incapable of alienation only in those lands beyond the *point of navigability.*

(See 146 U. S., p. 464.)

This accords with the doctrine of the State of South Carolina, that trusts for the public is in the "beds of tidal channels," and not of the shores or flats between high and low water mark, which is capable of improvement and tillage by the citizen, under sanction of the Government, and such became private property absolutely.

THE IMPLIED CONTRACT IN THIS CASE.

The counsel for the Government citing the case of *South Carolina vs. Georgia, 93 U. S., 4,* claimed that the same conditions and facts exist in that case as here. This is again incorrect. That was the case of a State asserting a compact with a State. This is a case of a citizen asking protection under the Fifth Amendment to the Constitution. In that case the Supreme Court asserted the paramount authority of the United States in improvement of its rivers; that the national legislature was beyond the control of the Courts as to their plans for the improvement of navigable rivers. That the acts of the Government in erecting dams "to divert the water from the northern channel into the southern channel is in the judgment of the law no illegal obstruction," 93 U. S., 14, and concluding the Court say: "It is sufficient for the present case to hold, as "we do, that the acts of defendant of which South Carolina com- "plains are not *unlawful*, and consequently that there is no "nuisance against which an injunction should be granted." P. 14.

That is the exact attitude of these plaintiffs here, that the acts of the U. S. Government are not *unlawful*, because the United States have supreme power to regulate commerce, but in the exercise of that supreme power our contention is that the limitation of the same Constitution, which gave them the supreme power, is the limitation in the Fifth Amendment. And although this Court could not by injunction stop the Government in execution of any of its plans for the purposes of improvement of any navigable river, yet still when the Government of the United States in the exercise of its supreme authority to improve navigable rivers takes private property within the meaning of the Constitution this Court will award just compensation.

We are here under the whole Constitution of the United States, and we not only admit the doctrine of *South Carolina vs. Georgia, 93 U. S., 4,* and *Wisconsin vs. Duluth, 96 U. S., 379,* but we insist on it. It is part of our case.

We have in our petition and complaint alleged what this Court in those cases held, that "these acts of the Government of the "United States have been done, and are being done, *lawfully* "by the officers and agents of the United States, under

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"authority of the United States in the exercise of its powers of "eminent domain and regulation of commerce under the Con- "stitution of the United States and laws of Congress," etc., (paragraph 7 of the Complaint.)

It is upon such allegation of the supreme power *lawfully* exercised and of the limitation of the powers in the Fifth Amendment, that our cause of action, an implied contract, is founded, and the Court below so held, following this Court in its own decision.

An implied contract arises, by operation of the law, out of the statement of our case, as alleged in the complaint; that is, the *lawful* taking by the Government of our private property in exercise of the power to regulate commerce and eminent domain, and of the limitation thereof.

Without condemnation on the part of the Government, and without proceeding of any kind, this Court held that such implied contract arose to pay just compensation, whenever the Government took private property, although it was not within the contemplation of Congress, or of the original surveys made under the Act, that such property should be taken; and where, without condemnation of what is necessary for the Government plans, property was in effect actually taken.

In the United States vs. Great Falls Manf. Co., 112 U. S., 645, the Supreme Court U. S., held :

"Where property to which the United States asserts no title "is taken, by their officers or agents, pursuant to an Act of Con- "gress, as private property, for the public use, the government "is under an *implied obligation* to make just compensation to the "owner."

"Such an implication being consistent with the Constitutional "duty of the Government, as well as with common justice, the "owner's claim for compensation is one arising out of *implied* "*contract,* within the meaning of the Statute defining the juris- "diction of the Court of Claims, although there may have been "no formal proceedings for the condemnation of the property "to public use."

"The owner may waive any objection he might be entitled "to make, based upon the want of such formal proceedings, "and, electing to regard the action of the Government as taking

'under its sovereign right of eminent domain, may demand just 'compensation for the property.''

And in *Great Falls Manufacturing Company v. The Attorney General, 124 U. S., 581,* this Court again affirmed this doctrine of an implied contract, and say :

"So that, if the Secretary of War, who was invested with "large discretion in determining what land was actually required "to accomplish in the best manner the object Congress had in "view, *found it necessary to take,* and has taken and used, and "still holds lands of the plaintiff for the proposed dam, which "happen *not* to be covered by the survey and map, *the United "States are as much bound to make just compensation therefor, as if "such lands had been actually embraced in that survey and map.* "Of course we are not to be understood as saying that the "Secretary of War could, by any act of his, bind the United "States to pay for lands taken by him which, manifestly, had "no substantial connection with the construction of the dam "across Conn's Island to the Virginia shore. It is sufficient to "say that the record discloses nothing showing that he has "taken more land than was reasonably necessary for the purposes "described in the Act of Congress, or that he did not honestly "and reasonably exercise the discretion with which he was "invested; and, consequently, the Government is under a Con- "stitutional obligation to make compensation for any property "or property-right taken, used, and held by him for the pur- "poses indicated in the Act of Congress, whether it is embraced "or described in said survey or map, or not."

United States v. Great Falls Manufacturing Co., 112 U. S., 645, 656.

See also *U. S. v. Jones, 109 U. S., pp. 513-514.*

Actual Loss to Plaintiffs.

The position of counsel that the owners of these lands have suffered no pecuniary loss, that they have enjoyed these lands *"without money and without price,"* (p. 29 Brief Plaintiff in Error) is a bare assertion to support which there are no facts found in the record and none in history. On the contrary the historical fact is and the record evidence below was that these grants were upon express condition of immediate reclamation of these lands, and on a rent reserved, and the reclamation of these lands has

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been the most costly in the whole history of the settling of this country and its agricultural life. Rice was for a century the chief staple of the Carolinas. Rice cultivation is a most costly and elaborate agriculture. The reclaiming of these fresh water tidal cypress swamps and jungles of the Savannah River and others, was the labor of many years and at great cost.

McCrady, the historian, says: "Rice soon became the staple "commodity of the province." "The wet deep mirey soil of "the cypress swamp, in which rice was found to grow so luxu- "riantly, especially when turned in cultivation."

McCrady's History of South Carolina, 349. South Carolina under Proprietory Government.

The records of this Court in the case of King vs. United States, No. —, shew that Associate Justice Wayne of this Court sold 400 acres of this land for forty-four thousand dollars.

The present plaintiffs paid large values for this rice land and the Court finds its value $10,000. This is hardly "without money and without price."

Impossible Extreme of Government's Position.

The position of the counsel for Government at page 28 of his brief is that the State had property rights in this land in trust, they were never surrendered and they could not be, and when the United States reached out her hand and took possession of them an inferior right had to yield even to extermination. (pp. 28-9 Counsel's Brief.) And "that the Government "could take possession of these rice fields and erect structures "on them without compensation." (p. 22 Brief Plaintiffs in Error). This is in direct contradiction to the decision of this Court in the Chicago Lake Front cases, 146 U. S., in which this Court held that the reclamation and occupation of lands after out to the point of navigability in the lake there was thereafter no trust in the State, and that the same was private property, and that its absolute alienation was consistent with the law of the trust in navigable waters held by the State and the United States.

The doctrine announced by the counsel for the Government would lead to this proposition, that is, that if the United States wishes to erect a light house on the site of lands which in the Chicago Front cases were by this Court confirmed in absolute title and possession and use to the railroad company, and reached out its hand to take possession of the railroad depot and structure or site of Illinois Central Railroad, that the right of the railroad would have to yield even to extermination! This is the *reductio ad absurdum* of counsel's position.

without compensation

The reason of the rule as expressed in counsel's brief, p. 17, quoted from the Chicago Front cases, was "So also by the com-"mon law the doctrine of dominion over and the ownership by "the Crown of lands within the realm under the tide water, is "not founded on the existence of the tide over the land, but "upon the *fact that the waters are navigable,*" but when in fact the lands were originally a cypress swamp and by reclamation are fields of grain, and when the fact is that they are *not navigable waters*, there cannot be any dominion when the reason for dominion ceases.

Again, at page 17 of his Brief, counsel for the Government quotes from the Chicago Front cases, "the doctrine is founded "upon the necessity of preserving to the public use the use of "navigable waters from interruption and encroachment," but the fact in this case is these are not navigable waters and there is no necessity for preserving to the public the use of navigable waters in this case, because there is no possibility of navigation in rice fields, and no obstruction to navigation. On the contrary the Court below expressly found, ¶ 9, fol. 20, Lynah case:

"For the purpose of the Government that water in the river "must be raised. The banks of this plantation materially as-"sisted this operation, for by their resistance the water is kept "in the channel."

It appears therefore that instead of being an encroachment or an obstruction, the banks are an aid to navigation; in the language of Ill. Cent. R. R. vs. Illinois, 146 U. S., 457:

"It is also true that portions of the submerged shoals and "flats which really interfered with navigation could better "subserve the purposes of commerce by being filled up and "reclaimed."

So that our case falls within the rule and the policy of the rule announced by this court. In addition the court below expressly found that "the whole rice culture of South "Carolina is founded on this system, and the policy of the "colony and the State has been to grant such lands for rice "culture" (*Finding VI*, page 7, Lynah case). That is, it was a fixed policy of Government for developing its agriculture in its chief staple, rice. Upon this policy of centuries rest vested rights and the rule of property which are invoked by defendants in error here.

MONONGAHELA CO. CASE.

The counsel for the Government referring to the Monongahela Navigation case, sums up the decision in that case to the effect that this court held only that the Government should make just compensation "for *all* it took possession of" (page 28, Brief of Plaintiffs in Error).

Now, this is just the contrary of what this court did decide. The facts, as we have shown in our main brief, were that that case arose upon the validity of a special provision of the river and harbor act of Congress, providing that the United States should *not* pay for the franchise of which it deprived the Monongahela Company and of which the United States did not seek any possession, and had and could make no use of, in fact did not need in any way the State franchise for the accomplishment of its purpose. The United States did not take possession in any sense. It simply *deprived* the Monongahela Company of the use of the State franchise. It simply

destroyed it, and yet for the deprivation of the use of this franchise and the complete destruction of that for which the United States did and could have no use whatsoever this court held that the United States should make just compensation, notwithstanding Congress had expressly enacted that it should not do so.

It will not do to dispose of this case and its principle and precedent as applicable to the case at bar by endeavoring to sum it up in the inaccurate phrase that the United States should make just compensation "for *all* it took possession of."

DIVERSION OF WATER—*A Hypothetical Case.*

The suggestion is made in the brief of the Government, page 32, that the Government could divert the water of this channel of the Savannah river, and that an equal question might arise as to just compensation to be paid for injuries occasioned by such diversion of water (page 32), and that such injuries would plainly not be the taking of any property. This suggestion, however, raises a question altogether distinct from the question at bar. We may say, however, that in the case of *Gardner vs. Newburgh* Chancellor Kent granted an injunction for the diversion of water of a certain stream on the ground that the same was a taking of the owner's property without compensation, and that this case is cited with approval by this court in the case of *Pumpeley vs. Green Bay Company*, in *13th Wallace, pages 180–181.* We may also call attention to the words of this court in the case of *Kaukauna Water Power Company vs. The Green Bay and Mississippi Canal Company, 142 United States, page 254*, in which this court held that "so far as land is taken for the purpose of the improvement either for the dam itself or the embankment or for overflow, or *so far as water was diverted*

from its natural course or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation" (page 276).

When this question of diversion of water arises it will be time enough to decide it specifically, but such is the attitude of this court upon like questions that have already been before this court.

If there had been a diversion of water in this case so as to have deprived the claimant of the irrigation of the rice fields and thus destroyed the land so far as rice culture is concerned, it would still have left the land dry land, upon which, as heretofore, all grain crops—that is, corn, wheat, oats, barley—and all vegetables and grass crops could have been grown; it would also have been fit for grazing and the habitation of man. Only one of its possible uses, *i. e.*, rice culture, needing irrigation, would have been affected by the diversion of the water.

But in the case at bar, by the permanent flooding of these rice fields and the destruction of them for all agriculture whatsoever, and reducing them to an irreclaimable bog on which neither man can work nor animal plow, as found by the court below, they are absolutely and altogether destroyed, and the owner altogether put out of possession.

This court has, upon this state of actual facts now presented in this case, decided the exact principle in the *Pumpeley case*, and it is therefore of no help to speculate upon what might be decided on another state of fact.

ATTORNEY GENERAL *vs.* PARMETER.

In re Portsmouth Harbor, 10th Price, 378 to 464:

This case cited by the Government as to the nature and extent of the grant under the Crown was for the abatement of a nuisance in the harbor of Portsmouth. The

information distinctly states that the *locus in quo* "was a place which hath been commonly used for the mooring of His Majesty's ships, called the King's moorings" (page 379). "And that His Majesty's ships of war and other ships, vessels and boats had free passage, and did or might cast anchor and lie there." "That they have been used or enjoyed or have been free and open for the passage and repassage, anchorage and lying of ships or vessels and boats as a part or parcel of the harbor or port of Portsmouth aforesaid" (pp. 381, 382).

The information further alleged that the erections of the defendants were a nuisance and injury to said harbor and would greatly endanger the loss of the said harbor and would destroy the said harbor or render the said harbor useless, so that His Majesty's ships and vessels and other ships and vessels and burden would not be able to come into or go out of the said harbor as they had always been used to do; or if such ships and vessels should be able to come into or go out of the said harbor, the same would not be able to remain long there or ride with any safety" (p. 383).

"Soon after the defendants began to make such erections and works, they had notice from the commissioners of the navy that such erections and works if completed, would be injurious to said harbor, and were requested to desist and remove the same" (p. 383).

"And that the defendants disregarding such notice, finished said erection to the great prejudice and damage of His Majesty's navy and to the great injury of the said port or *harbor* of Portsmouth and more especially to the mooring of His Majesty's ships at the place called the King's moorings aforesaid" (p. 384).

"That no person or persons have or had been in possession of such part of the said harbor under color or pretense of the alleged grant claimed by the defendants, until the

defendants began, in 1784, to make such erections" (p. 387, also p. 390).

The alleged grant was in 1628 and nothing was done thereunder until 1784.

And particularly the said information alleged "that before the year 1784 the defendants did not make any erection or *exercise any act of ownership* in or upon the same nor take any rent, issues or profit, or derive any benefit therefrom."

The exchequer court in delivering judgment rested the same upon the ground that it is clearly laid down that *ports creeks, and havens* are subjects of the public right and they describe what these are: "A port more immediately accommodated of protection both natural and artificial. A haven which itself is naturally protected and where ships may ride or lie in safety. A creek, a member of a port where there is no custom-house or comptroller, but where there are certain officers for the purpose of collecting the King's revenues. In none of these places, therefore, can the public right be waived, although there might be a grant of the soil."

Again the court founded its judgment upon the express finding of fact that "the erections were a nuisance and detrimental to the *harbor* of Portsmouth" (p. 400).

Again, the court held the grant void because "the inquisition did not make proper returns to the commission, in that no return is made to that part of the commission in the inquisition whether any prejudice or damage will result to any person or persons, and whether the obtaining of the aforesaid lands from overflowing and surrounding with the sea are of great advantage and profit to the several parts of the county, and in that it transgresses directly the commission in granting a part of the *port* of Portsmouth," (p. 405).

Again, the court of exchequer bases its judgment upon the lapse of time in which nothing was done under the grant, saying that "the distance between 1628 and 1784 is not what

the Crown expected when it contemplated that there should be an undertaking and attempt at recovering the land, but that it should be a reasonable time to recover the land from the sea" (p. 407).

And the court of exchequer again held that a grant made, of which no advantage had been taken, and never had been acted upon for a *century and a half*, had lapsed and the presumption was of surrender; so "where we find the King, by his subjects, still in possession of this soil for the passing and repassing of such vessels, we must conclude that if it ever existed in force this grant had been in the interim surrendered to the Crown."

And the court further held "that the King could not grant such creeks and ports, including the greatest *port* in the Kingdom and one of the most important."

This case went up to the House of Lords, and is quoted in pages 412 to 464, 10*th Price, In re Portsmouth Harbor*.

At page 454, on the question of reclamation and possession under the grant by embankment, and thus excluding the waters of the sea, Lord Redesdale said: "I apprehend there is a *part of the land in possession* under these letters patent. It is what extends from the passage near the town of Lymington near the bridge. Now that is to my knowledge *embanked* and I believe has been for a vast number of years; that *is in possession, I believe, under the grant.*"

And the discussion of the question of possession and prescription under the grant as it had been made in the court below was part of the discussion in the House of Lords. The House of Lords, in delivering the judgment, by Lord Chancellor, said, page 463:

Eldon, Lord Chancellor: "My lords, I shall not break in upon your lordships' usage by offering any reason for the affirmance of this judgment, but I am anxious to say this and this only, that, as I conceive, *where there has been a pos-*

session for sixty years under this grant, nobody can be removed, so I desire not to be understood to imply one way or the other what may be the effect of these letters patent with respect to any one part of the land which this instrument covers, except the soil on which these buildings are erected."

It thus appears from this case that the House of Lords does not state on what particular ground they affirm the judgment, whether the grant was originally good or whether the grant, if originally good, by lapse of time was presumed to be surrendered to the Crown, or whether the grant was a part of the *harbor* of Portsmouth, none of which reasons or grounds appear in the case above; but what is of importance in the case is the decision of the House of Lords that "where there has been a *possession for sixty years under this grant, nobody can be removed.*"

In other words, independent of any questions that might be made as to the grant and its validity, when once the grantee had *embanked*, and thus reclaimed, as Lord Redesdale remarked, had been the case of a part of the land within the boundaries of the grant, and had been in possession sixty years, his right, title, interest, and possession was beyond even the question of the Crown.

The facts of this case as to location of the land are widely different from facts in case at bar, which are not part of a port or harbor; but applying the principles of this case to the case at bar on the point of prescription, the position of the claimants in this cause is beyond all attack, for the court below found as a matter of fact in the Lynah case that by the muniments of title it appeared that the land was enclosed and in a state of culture 120 years ago and probably longer; that the nature of the enclosure was an *embankment* protecting the rice plantation from the river, and that it had been in actual continued use for

seventy years and upwards as a rice plantation. Findings of fact 4 and 6, p. 7, Transcript of Record, Lynah case.

And in the Williams case, the court finds at page 13 of the transcript of record as follows:

"The facts in relation to the said finding being in all respects the same as in the said case of *Lynah vs. The United States*, as set out at length in the opinion of the court therein, dated 25th of January, 1900, and for the reasons therein stated It has been for *over a century* protected from the river or any invasion of tidal water by an *embankment* and cultivated in rice, and was so cultivated by the plaintiffs since their ownership of the said plantation in 1876, up to the time of the abandonment thereof" (p. 13).

So that if the rights of the claimants are to be measured by that case and by the rights in the British Crown, to whom the State at the close of the Revolutionary war was successor, and the rights of the United States depend upon the right surrendered by the State, these claimants, in the language of Lord Eldon, after sixty years' possession cannot be removed; they cannot be ousted of possession, as is found in the court below, without compensation.

All this is independent of what we have already shown in this argument, that by the law of the State of South Carolina, looking to its own grants, statutes, and decisions, the limit of *private ownership*, if covered by the grant, goes down absolutely to low-water mark, and that such is the law after reclamation as recognized by this court in decided cases.

J. P. K. BRYAN,
Counsel for Defendants in Error,
Arthur Lynah et al., in No. 45.
JULIAN MITCHELL, JR.,
Counsel for Defendants in Error,
Chas. A. Williams et al., in No. 59.